Supreme Court, U.S.
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No. 03-7

In the Supreme Court of the United States

MICHAEL A. NEWDOW, PETITIONER

v.

UNITED STATES CONGRESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag violates the Establishment Clause of the First Amendment.

2. Whether there is a waiver of sovereign and Speech or Debate immunities inherent in the Establishment Clause.

3. Whether a noncustodial parent has Article III standing to challenge the Pledge of Allegiance on Establishment Clause grounds.

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OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (02-1574 Pet. App. 1a-24a) is reported at 328 F.3d 466.[1] The original opinion of the court of appeals (Pet. App. 25a-58a) is reported at 292 F.3d 597, and the court's subsequent opinion on standing (Pet. App. 89a-98a) is reported at 313 F.3d 500. The opinion and orders of the court of appeals denying intervention (Pet. App. 99a-109a) are reported at 313 F.3d 495 and 313 F.3d 506. The order of the district court (Pet. App.

[1] Citations are to the appendix to the petition for a writ of certiorari filed by the United States in No. 02-1574, *United States* v. *Michael A. Newdow*, because the instant petition does not include an appendix and the appendix in No. 02-1574 is the one to which petitioner Newdow refers. See Pet. 1 n.**.

110a), adopting the findings and recommendation of the magistrate judge that the case be dismissed (Pet. App. 111a-112a), is unreported.

JURISDICTION

The court of appeals entered its original judgment on June 26, 2002. The court issued an amended opinion on rehearing on February 28, 2003. The court of appeals issued an order staying its mandate on March 4, 2003. On May 20, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 26, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATEMENT

1. In 1942, as part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a pledge of allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). As originally enacted, the Pledge of Allegiance read: "I pledge allegiance to the flag of the

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[2] As noted in the United States' petition (02-1574 Pet. 2 & n.1), no federal statute waives the sovereign immunity of the United States for suits seeking declaratory or injunctive relief under the First Amendment, and thus the jurisdictional basis for petitioner's suit against the United States is unclear. However, the absence of such a waiver is without jurisdictional consequence in this case because the United States could have, and through the filing of its own petition for a writ of certiorari should be deemed to have, intervened as of right in this action against the school district and its superintendent to defend the constitutionality of the Pledge of Allegiance, 4 U.S.C. 4, against petitioner's facial and as-applied challenges. See 28 U.S.C. 2403(a).

United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

In amending the Pledge, the Committee Reports noted that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see also S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, with the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, *supra*, at 2; S. Rep. No. 1287, *supra*, at 2.

The Reports further explained that the amendment would highlight a foundational difference between the United States and "Communist[]" nations: "Our Ameri-

can Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, *supra*, at 1-2; see also S. Rep. No. 1287, *supra*, at 2. As amended, the Pledge would thus textually reject the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, *supra*, at 2; see also S. Rep. No. 1287, *supra*, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."). The House Report further noted that, through "daily recitation of the pledge in school," "the children of our land * * * will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us." H.R. Rep. No. 1693, *supra*, at 3.

Both the Senate and House Reports expressed the view that, under controlling precedent from this Court, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, *supra*, at 3 (citing *Zorach* v. *Clauson*, 343 U.S. 306 (1952)); see also S. Rep. No. 1287, *supra*, at 2.[3]

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[3] Following the court of appeals' decision in the instant case, Congress reaffirmed the content of the Pledge of Allegiance and Congress's view that the legislation is constitutional. Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1(11), 116 Stat. 2059.

2. California law requires that each public elementary school in the State "conduct[] appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (West 1989). The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." *Ibid.* In satisfaction of that statutory requirement, respondent Elk Grove Unified School District (Elk Grove) has adopted a policy that directs each of its elementary schools to "recite the pledge of allegiance to the flag once each day." Pet. App. 27a. No child is compelled to join in reciting the Pledge. *Id.* at 28a.

Petitioner Michael Newdow is the noncustodial father of a child enrolled in a public elementary school within the jurisdiction of respondent Elk Grove. Pet. App. 2a, 90a-91a. In the school that petitioner's daughter attends, the teacher leads the students in reciting the Pledge of Allegiance daily. *Id.* at 3a.

The child's mother, who was never married to petitioner, has "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child. Pet. App. 90a-91a. While petitioner retains limited visitation rights, the right to access the child's school and medical records, and the right to "consult" on "substantial" decisions pertaining to the child's "educational needs," if the parents disagree, the child's mother "may exercise legal control of" the child as long as it "is not specifically prohibited or inconsistent with the physical custody order." *Id.* at 91a.

In March 2000, petitioner filed suit against the United States Congress, the President, the United States of America, the State of California, and two California school districts and their superintendents,

seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment. Compl. 6, 36; Pet. App. 4a-5a. He also sought injunctive relief requiring Congress and the President to remove those words from the Pledge and prohibiting California schools from leading students in reciting the Pledge. Compl. 37; Pet. App. 4a-5a. The Complaint explains that petitioner's child is "an unnamed plaintiff whom he represents as 'next friend.'" Compl. 3. The Complaint asserts that the recitation of the Pledge in his child's school "results in the daily indoctrination of the Elk Grove Unified School District's students—including Plaintiff's daughter—with religious dogma," *id.* at 18-19, and that such actions "infringe[]" upon petitioner's "unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.* at 20; see also *id.* at 36. The Complaint further asserts that petitioner's "position as the father of a child attending the State's public schools grants him standing in this matter in his own right and on behalf of his daughter." *Id.* at 26.

The district court dismissed the complaint for failure to state a claim, relying on numerous decisions of this Court expressly addressing the Pledge and describing it as consistent with the Establishment Clause, as well as on a decision of the Seventh Circuit rejecting a similar challenge to the Pledge. Pet. App. 110a-112a (adopting magistrate judge's findings and recommendation, which cites *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *id.* at 625 (O'Connor, J., concurring); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J., concurring); *Sherman* v. *Community Consol. Sch. Dist.*

21, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993)).

3. a. A divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 25a-58a. As an initial matter, all three members of the panel agreed with the dismissal of the President and Congress from the lawsuit, on the grounds that the President is not a proper defendant for challenging the constitutionality of a federal law under *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), and that the Congress cannot be sued under the Speech or Debate Clause, U.S. Const. Art. I, § 6, Cl. 1. See Pet. App. 29a-30a; *id.* at 53a (Fernandez, J., concurring and dissenting). The court also ruled that petitioner lacks standing to file suit against the Sacramento City Unified School District and its superintendent "because his daughter is not currently a student there." *Id.* at 32a.

The court did conclude, however, that petitioner has standing to challenge Elk Grove's policy of reciting the Pledge "because his daughter is currently enrolled in elementary school" in Elk Grove. Pet. App. 32a. In addition, a majority of the court concluded that petitioner has standing in his own right to challenge the facial constitutionality of the 1954 Act amending the Pledge because "the mere enactment of a statute may constitute an Establishment Clause violation," *id.* at 33a, and because the 1954 Act amounts to a "religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter." *Id.* at 37a.[4]

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[4] The court did not address the constitutionality of the California law requiring patriotic exercises in elementary school classrooms. Pet. App. 30a-31a.

b. Turning to the merits of petitioner's complaint, the majority held that, with the addition of the phrase "under God," the Pledge of Allegiance violates the Establishment Clause. Pet. App. 37a-42a. The majority began by explaining that this Court has adopted three different tests to analyze Establishment Clause violations (*id.* at 37a)—the three-prong test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); the "endorsement" test, *County of Allegheny*, *supra*; and the "coercion" test, *Lee* v. *Weisman*, 505 U.S. 577 (1992)—and that the court of appeals was "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." Pet. App. 41a.

The majority held that the 1954 Act and the school district policy failed the "endorsement" test both because the Pledge's reference to God "is a profession of a religious belief, namely, a belief in monotheism" and because it "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." Pet. App. 41a-42a. The majority further concluded that the 1954 Act and the school district's policy fail the "coercion" test because "the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." *Id.* at 45a.

Finally, the majority concluded that the Pledge fails the *Lemon* test because it has the purpose of advancing religion. Pet. App. 46a. In so holding, the majority rejected the United States' argument that the Pledge should be looked at "as a whole," and concluded that the "*sole* purpose" of the 1954 Act was to "advance religion, in order to differentiate the United States from nations under communist rule." *Id.* at 46a-47a. The majority further concluded that Elk Grove's policy ran afoul of the *Lemon* test because it "convey[s] an impermissible

message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God." *Id.* at 50a.

The majority dismissed in a footnote the numerous statements by this Court and its Members expressly addressing the Pledge and affirming its constitutionality as "dicta" that was announced by this Court without "appl[ying] any of the three tests to the Act." Pet. App. 50a-51a n.12. The majority also expressly disagreed with the analysis and conclusion of the Seventh Circuit in *Sherman*, *supra*, which upheld the Pledge against a similar Establishment Clause challenge. *Ibid.*

c. Judge Fernandez dissented. Pet. App. 53a-58a. Judge Fernandez first expressed his "serious misgivings" about the majority's conclusion that petitioner had standing to challenge the facial constitutionality of the 1954 Act, but ultimately concluded that the question "makes little difference to the resolution of the First Amendment issue in this case." *Id.* at 53a n.1. With respect to the Establishment Clause challenge, Judge Fernandez explained that "such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Id.* at 55a. Judge Fernandez also noted that this Court has repeatedly indicated that the Pledge's text, as amended, does not violate the Establishment Clause, and he agreed with the Seventh Circuit that the court of appeals should "respect" those assurances: "If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Ibid.* (quoting *Sherman*, 980 F.2d at 448).

Finally, Judge Fernandez accused the majority of confining itself to legal "elements and tests, while failing to look at the good sense and principles that animated those tests in the first place." *Id.* at 57a; see also *id.* at 57a n.8 (noting that the majority's holding would preclude use of many patriotic songs, such as "God Bless America," "America the Beautiful," "The Star Spangled Banner," and "My Country 'Tis of Thee," in public ceremonial occasions).

d. While the case was pending on the United States' and Elk Grove's petitions for rehearing and rehearing en banc, the mother of petitioner's child notified the court that petitioner lacked legal custody of the child and legal control over the child's educational and religious upbringing. She further advised that, as the custodial parent, she "wish[es] for her [child] to be able to recite the Pledge at school exactly as it stands." Banning C.A. Mot. to Intervene 10. The United States then filed a motion to enlarge the record and a supplemental brief arguing that petitioner lacks standing to prosecute his challenge to the Pledge on its face or as applied by Elk Grove.

The court of appeals issued a separate decision holding that petitioner has standing to prosecute his constitutional challenge to the Pledge. Pet. App. 89a-98a. The court concluded that, while petitioner no longer could prosecute the action on behalf of or to vindicate the interests of his child, petitioner continued to have standing in his own right to challenge "unconstitutional government action affecting his child." *Id.* at 92a. The court noted that the custody agreement does not strip petitioner of all of his parental rights, because he retains the "the right to inspect his daughter's school and medical records" and the "right to consult" on educational decisions, albeit with the mother "having

ultimate decision-making power." *Id.* at 95a. The court then reasoned that, because California law recognizes a right in noncustodial parents to "expose" their children to their beliefs and values, petitioner was injured because state law "surely does not permit official state indoctrination of an impressionable child on a daily basis with an official view of religion contrary to the express wishes of *either* a custodial or noncustodial parent." *Id.* at 96a. The court further reasoned that petitioner has standing because the mother "has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." *Ibid.* Because the Pledge, in the court's view, "provides the message to Newdow's young daughter" that "her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom," the court concluded that petitioner has suffered a legally cognizable injury that provides him with Article III standing. *Id.* at 97a.[5]

4. a. The court issued an amended opinion on rehearing. Pet. App. 1a-24a. In its amended opinion, the court limited its Establishment Clause holding to the Pledge's use by Elk Grove in its schools. *Id.* at 18a. With respect to petitioner's challenge to the facial constitutionality of the Pledge, the court of appeals vacated the district court's decision in favor of the United States and remanded "for further proceedings consistent with our holding." *Ibid.*

In addition, the court amended its decision to hold only that Elk Grove's policy violated the coercion test, and did not address either the endorsement test or the

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[5] Judge Fernandez concurred in the judgment on standing, but not in the majority's "allusions to the merits of the controversy." Pet. App. 98a.

Lemon test. Pet. App. 11a. The panel, however, concluded that the recitation of the Pledge violated the coercion test for the same reasons that the original opinion found a violation of the endorsement test. Compare *id.* at 11a-13a, with *id.* at 41a-43a.

The court also elaborated on its rejection of the numerous statements in this Court's opinions affirming the constitutionality of the Pledge and similar official acknowledgments of the Nation's religious heritage. The court assumed that "public officials do not unconstitutionally endorse religion when they recite the Pledge," but that schools nevertheless could not "coerce impressionable young schoolchildren to recite it, or even to stand mute while it is being recited by their classmates." Pet. App. 15a. The court also purported to distinguish references to God in the Pledge from those in the Declaration of Independence and National Anthem on the ground that the pledge "is a performative statement." *Id.* at 16a; see also *ibid.* ("To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.").

Judge Fernandez dissented from the court's Establishment Clause holding for the same reasons discussed in his initial dissenting opinion. Pet. App. 19a-24a. Judge Fernandez also noted that, although the majority "now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence." *Id.* at 19a n.1.

b. Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, filed a lengthy dissent from the court of appeals' denial of rehearing en

banc. Pet. App. 67a-87a. The dissent described the panel opinion as

> wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

Id. at 67a-68a (footnote omitted). The dissent stressed that this Court has distinguished between "patriotic invocations of God on the one hand," and public school "prayer, an 'unquestioned religious exercise.'" *Id.* at 72a. The dissent further observed that, until the panel's decision here, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." *Id.* at 78a-79a. Finally, the dissent noted that, while the panel "adopts a stilted indifference to our past and present realities as a predominantly religious people," *id.* at 86a-87a, "the Supreme Court has displayed remarkable consistency —patriotic invocations of God simply have no tendency to establish a state religion," *id.* at 86a.

Judges McKeown, Hawkins, Thomas, and Rawlinson separately dissented from the denial of rehearing en banc on the ground that the case "presents a constitutional question of exceptional importance." Pet. App. 88a.

DISCUSSION

1. The first question presented by the petition—whether the inclusion of the phrase "under God" in the Pledge of Allegiance to the United States Flag,

4 U.S.C. 4, violates the Establishment Clause of the First Amendment—is identical to the question presented by the United States' petition for review from the same Ninth Circuit judgment. See 02-1574 Pet. I. Thus, to the extent petitioner here seeks review of the same aspects of the court of appeals' judgment as the United States does in its own petition (that is, both the court's ruling that the Pledge is unconstitutional as applied in schools and the court's vacatur of the judgment in the United States' favor concerning the facial constitutionality of the Pledge), the United States agrees that an exercise of this Court's certiorari jurisdiction is warranted, for the reasons explained in the government's own petition and reply brief at the petition stage. See 02-1574 Pet. 13-30; 02-1574 Pet. Reply 1-8.

In his petition (Pet. 7), however, petitioner more broadly frames the question as an effort to obtain "the full declaratory relief sought in his Original Complaint." In that complaint, petitioner seeks declaratory relief against not just the United States, but also against the Congress. See Compl. 36 ("WHEREFORE, Plaintiff prays for relief and judgment as follows: I. To declare that Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses of the United States Constitution."). Accordingly, to the extent that the petition, and in particular the second question presented, seeks this Court's review of the court of appeals' dismissal of petitioner's claims against the Congress, see Pet. App. 5a-6a, further review should be denied.

As the court of appeals correctly concluded (Pet. App. 5a-6a), the Speech or Debate Clause of Article I precludes courts from exercising jurisdiction over the Congress, or any of its Members, for claims arising

from the enactment or amendment of legislation. That Clause provides that "[t]he Senators and Representatives * * * shall not be questioned in any other Place" "for any Speech or Debate in either House." U.S. Const. Art. I, § 6. This Court has read the Speech or Debate Clause "broadly to effectuate its purposes," such that any conduct falling within the "sphere of legitimate legislative activity" is immune from scrutiny by the courts. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Because passage of the 1954 amendment to the Pledge of Allegiance was quintessential legislative activity, it falls squarely within the aegis of the Speech or Debate Clause. *Id.* at 504 (Clause protects all activities "integral" to the "consideration and passage or rejection of proposed legislation") (quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972)). That protection applies regardless of whether the conduct is alleged to violate the First Amendment. *Eastland*, 421 U.S. at 509-511.

Petitioner asks this Court to decide whether the Establishment Clause includes an implicit waiver of sovereign immunity and Speech or Debate immunity. *Eastland* already rejected the argument that First Amendment claims are excepted from Speech or Debate immunity. 421 U.S. at 509-511. Likewise, this Court has long held that sovereign immunity extends to claims asserting violations of constitutional rights. See, *e.g.*, *Ex parte Young*, 209 U.S. 123, 150 (1908). Indeed, there would be no need for the doctrine developed in *Ex parte Young*, which permits suits for injunctive relief against individual officers of the government to enforce constitutional rights, *id.* at 155-156, if suit directly against the United States (or the States) were permissible any time a First Amendment violation is

alleged.[6] Petitioner, moreover, identifies no conflict in the circuits, or any authority at all, that supports his contention that he may obtain declaratory relief against the United States Congress or that the Establishment Clause implicitly waives the United States' sovereign immunity.

Furthermore, because the United States is a named defendant, and would voluntarily appear as an intervenor under 28 U.S.C. 2403 in any event, the question of the United States' sovereign immunity is moot, and the addition of the United States Congress would have no practical effect on the scope of declaratory relief available to petitioner.

Beyond that, it is not uncommon for pro se plaintiffs, like petitioner, to misidentify the appropriate federal defendants in a suit challenging the constitutionality of federal law. Which governmental defendants may properly be sued in such pro se cases is a matter that the lower courts routinely resolve without "turning the Establishment Clause" or any other constitutional provision "into a nullity," as petitioner fears. Pet. 20. Indeed, at the same time that the court of appeals dismissed the Congress from this case, it granted petitioner relief on his constitutional claim. The question of

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[6] Thus, contrary to petitioner's assertion (Pet. 18-19), Congress's and the United States' immunity from suit does not leave individuals without recourse against Establishment Clause violations. "Legislative immunity does not, of course, bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U.S. 486, 503 (1969). The immunity doctrines simply bar judicial review of legislation in actions directly against the Congress, its Members, or the United States. See *Tilton* v. *Richardson*, 403 U.S. 672, 683-684 (1971) (invalidating portion of Act of Congress on Establishment Clause grounds, even though neither Congress nor the United States was named as a defendant).

Congress's amenability to suit thus does not present the type of important or pressing constitutional question that merits an exercise of this Court's certiorari jurisdiction. Accordingly, to the extent that petitioner's first and second questions presented exceed the scope of the questions presented by the United States for review, the petition should be denied.[7]

2. Petitioner also seeks this Court's review of the question whether he has standing to challenge the Pledge of Allegiance. Pet. 20-23. The court of appeals, however, held that petitioner *does* have standing to challenge the Pledge of Allegiance. Pet. App. 6a-8a. Petitioner thus is not aggrieved by the Ninth Circuit's standing judgment and lacks standing to seek this Court's review of that judgment in his favor. See, *e.g.*, *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) ("[a] party may not appeal from a judgment or decree in his favor"). To the extent that petitioner is of the view that his standing can properly be rested on a variety of grounds beyond that upon which the court of appeals relied, see Pet. 21-23, he may present those arguments in defense of the judgment below if this Court grants the United States' petition, which seeks review of the Ninth Circuit's holding that petitioner Newdow has standing to challenge the Pledge. See 02-1574 Pet. I.

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[7] Although petitioner names the President as a respondent, the petition itself does not seek review of the court of appeals' correct holding that *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (plurality opinion), precludes petitioner's suit against the President of the United States. See Pet. App. 5a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. To the extent that the first and third questions presented duplicate those presented by the United States in its own petition, *United States* v. *Newdow*, No. 02-1574, the petition should be held pending this Court's disposition of the government's petition, and then disposed of as appropriate in light of the Court's decision there.

Respectfully submitted.

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